BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

Claimant VS. TOPEKA STATE HOSPITAL, (STATE OF KANSAS) Respondent	Docket No. 202,008
AND	{
STATE SELF-INSURANCE FUND Insurance Carrier	}

ORDER

The Kansas State Self-Insurance Fund appeals from a Preliminary Hearing Order entered by Administrative Law Judge James R. Ward on August 3, 1995.

ISSUES

The issue to be considered on appeal is whether claimant gave notice within ten (10) days of the date of accident or, if not, whether there was just cause for failure to do so.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the arguments of the parties and reviewing the record, the Appeals Board finds claimant did give notice within ten (10) days of accidental injury on March 27, 1995.

In his application for hearing, claimant originally alleged accidental injury on March 6, 1995. However, the evidence produced at hearing indicated claimant initially injured his neck on March 6, 1995, aggravated that injury by continuing to work thereafter and then suffered additional injury to his neck on March 27, 1995. The injury on March 6, 1995 occurred when he turned his head to hear a noise behind him and felt a "pop" in his neck. Claimant's shoulder and neck hurt and progressed in the weeks he worked thereafter. On March 27, 1995 he had another episode while mowing. He turned the mower and felt a shot of pain. He testified that he was worse after this incident of March 27. Claimant does not recall reporting the incident of March 6, but provides uncontradicted testimony he gave notice of the incident of March 27, 1995.

Respondent first contends that it is improper to consider the alleged accident other than the one of March 6, 1995. The record reflects, however, that prior to the preliminary hearing claimant sought to amend this application for hearing to one alleging a series of injuries through March 24, 1995. The evidence produced, thereafter, showed the injuries through March 27, 1995. The Appeals Board considers it appropriate under the circumstances, in this case, to consider the pleadings amended to conform to the evidence. Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

Respondent next contends that the evidence did not show that claimant did, in fact, suffer injury through March 27, 1995. From our review of the evidence summarized above, the Appeals Board finds the evidence does establish claimant suffered additional injury through March 27, 1995. The only evidence on the issue is the claimant's own testimony. It does support the contention of injury aggravated through March 27, 1995. Notice given on March 29, 1995, therefore, satisfies the requirements of K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of the Administrative Law Judge of August 3, 1995, should be, and the same is hereby, affirmed.

II IS SO ORDERED.
Dated this day of November 1995.
BOARD MEMBER
DOADD MEMBED
BOARD MEMBER
BOARD MEMBER

c: George H. Pearson, Topeka, Kansas Kathryn D. Myers, Topeka, Kansas James R. Ward, Administrative Law Judge Philip S. Harness, Director